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Supreme Court, U.S.
FILED

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No. 08-

IN THE

Supreme Court of the United States

STEPHAN J. LAWRENCE
Petitioner,

v.

ALAN GOLDBERG, ET AL
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX

PETITION FOR A WRIT OF CERTIORARI SUPPLEMENTAL APPENDIX

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[1] This Supplemental Appendix is in addition to the Appendix at the end of the Petition for Certiorari and is denoted as "a2."

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO: 05-20485-CIV-GOLD/TURNOFF

IN RE:

STEPHAN JAY LAWRENCE,

Appellant/Debtor,

REPORT AND RECOMMENDATION

THIS CAUSE is before the undersigned upon the Honorable Alan S. Gold's Order of Reference dated August 25,2006, which refers the following matters to the undersigned: Appellant's Motion for Release From Contempt Incarceration [D.E. 119], Appellee's Motion to Strike/Response in Opposition to Motion by Appellant for Release From Incarceration [D.E. 120], and Appellant's Emergency Request for: (1) a hearing on the Motion for Release of Contemnor, and (2) an Order to Compel Production of Witnesses for Hearing [D.E. 121].

A hearing on these matters was held before the undersigned on Friday, September 22, 2006. Appellant, Debtor, Stephan Jay Lawrence, appeared on his own behalf. Counsel for the Trustee was also present.

I. Background

The Court is quite familiar with the facts of the instant case. As such, the undersigned will only address the history of this matter by way of summary. Stephan Jay Lawrence (Lawrence) is a Debtor who

was incarcerated for civil contempt based on his failure to comply with a bankruptcy court order to turn over the *res* of an inter vivos trust to a Chapter 7 trustee. *See* Lawrence v. Goldberg, et al, 153 Fed. Appx. 552 (11th Cir. 2005) (Lawrence 2005).

One of the key events in this case is the settling of an offshore trust valued at $7 million by Lawrence in January 1991. Lawrence v. Goldberg, et al, 279 F. 3d 1294 (11th Cir. 2002)(Lawrence 2002). Shortly thereafter, an arbitration judgment was issued against him in the amount of $20.4 million. Id.

At some point, it appears that Lawrence had the sole power to appoint Trustees in relation to the trust mentioned *supra*. Id. Over time, several amendments were made to the Trust. In February 1991, a spendthrift provision was added. Id. For example, in January 1993, the Trust was amended so that the settlor's powers could not be executed under duress or coercion and his life interest would terminate in the event of his bankruptcy. Id. A subsequent amendment was made declaring Lawrence to be an "excluded person" under the Trust, thus proscribing his ever becoming a beneficiary of the Trust. Id. In 1999, the Trustees issued a "Declaration of Intent" stating that the excluded person status was irrevocable. Id.

Sometime in June of 1997, Lawrence filed a voluntary petition in bankruptcy. The Bankruptcy Trustee objected to the debtor's discharge. Id. at 1297. During the proceedings, a discovery dispute arose over the sufficiency of Lawrence's answers to interrogatories. Id. In July 1999, the Bankruptcy Trustee sought an order directing Lawrence to turn over the assets of the Trust. The requested order was granted and the court set a status conference in order

to monitor compliance. Id. At the conference, the court found that Lawrence had control over the Trust, through this retained powers to remove and appoint Trustees and to add and exclude beneficiaries, and it rejected Lawrence's impossibility defense. Id. In so doing, the Court held Lawrence in contempt for failing to turn over the Trust assets. Id.

The contempt order was issued on September 8, 1999. Lawrence failed to comply and on October 5, 1999, the bankruptcy court ordered his incarceration pending compliance. On July 31, 2000, the district court affirmed both the Turn Over Order and the contempt orders. Id.

Lawrence remains incarcerated. According to the terms of the contempt order, he is fined $10,000 per day until he purges his contempt. Id. Lawrence continues to claim that on September 13, 19[illegible] he executed a document naming Goldberg as t[illegible] of the Trust and advised the previous Trust[illegible] of his actions. He insists that this is the limit of his power to turn over the assets of the Trust to the Bankruptcy Trustee. Id.

II. Evidentiary Hearing

As noted supra, a hearing took place before the undersigned on September 22, 2006. The matter was expected to go forward as an evidentiary hearing and a court reporter was in attendance. However, no testimony was heard, as Mr. Lawrence continued to assert his fifth amendment privilege.

During the proceedings, Lawrence contended that the Court should hear argument on appellate issues, and matters related to the denial of his sixth amendment rights. Lawrence further argued for the

nullification of prior court orders. Along these same lines, Lawrence discussed his allegation that numerous hearings took place in *ex parte* fashion and that he was never given the opportunity to confront his accusers.

The undersigned's review of the record reveals that there are no pending appellate matters. It is this Court's understanding that the Honorable Alan S. Gold entered an Order enjoining Lawrence from filing any other appeals or pleadings. *See* Order Denying Mot. Reconsider (June 1. 2005) [D.E. 51]. Further, on March 23, 2006, Judge Gold entered an Order Striking Pleadings [D.E. 116]. In that order it was made clear that "if the filings from Appellant [are] not related to the issue of whether his continued incarceration has lost its coercive effect, those filings will be dismissed sua sponte. Id. The June 1, 2005 order, *inter alia*, was summarily affirmed by order of the Eleventh Circuit Court of Appeals on July 19, 2006. *See* [D.E. 118].

During the instant proceedings, the Court reminded Lawrence of the record below and the limited scope of the undersigned's referral. In this regard, it was repeatedly suggested that Lawrence focus his argument on the issue of release from incarceration and the present state of the contempt order's coercive effect. In response to the Court's suggestion, Lawrence briefly addressed the issue of the applicability of 28 U.S.C. § 1826.

III. Relevant Statute

28 U.S.C. § 1826. Recalcitrant Witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury

> proceeding of the United States refuses without just cause to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of-
>
> (1) the court proceeding, or
>
> (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen (18) months.

28 U.S.C. § 1826.

Lawrence argues that he is a recalcitrant witness under § 1826, and that as such, he should have been released after eighteen (18) months. The Trustee disagrees. As a general matter, case law interpreting this statute has found that it is applicable in bankruptcy proceedings. See *In re Martin-Trigona*, 732 F. 2d 170 (2d Cir. 1984)(the use of the word "any" in subsection (a) of this section--providing that a court may confine a witness whenever a witness in any proceeding before or ancillary to any court refuses to comply with an order of the court to testify or provide other information-indicated that Congress intended this section to apply to bankruptcy proceedings). However, in its June 3, 2004 Memorandum Opinion,

the Bankruptcy Court specifically considered, and rejected, Lawrence's argument that he was a recalcitrant witness under the instant statute. In the Memorandum, Judge Cristol quotes from a 2002 Second Circuit opinion. The relevant portion of the opinion states:

> In Securities and Exchange Comm'n v. Princeton Economics Int'l. Ltd.. 152 F. Supp. 2d 456, 459 n.2 (S.D.N. Y. 2001), appeal dismissed, 284 F. 3d 404 (2d Cir. 2002), the district court stated that, "[t]he 'Recalcitrant Witness' statute is inapplicable to this matter because §1826 sets a maximum limit of 18 months incarceration for witnesses found in civil contempt,[sic] usually pertains to grand jury proceedings, and does not because of the ipse dixit of counsel apply to one court order to produce missing assets, especially since § 1826 is not cited anywhere in the Contempt Order." Likewise, Lawrence's case does not involve grand jury proceedings and the Contempt Order, authored by the undersigned Judge, does not reference section 1826.
>
> The act required of Lawrence, the turnover of the res of an offshore asset-protection trust, is simply not one of the acts delineated in the unambiguous provisions of section 1826(a). That section contemplates refusal without just cause, to comply with a court order "to testify or provide other information, including any book, paper, documents, record or other material....," 28 U.S. C. § 1826, none of which is contemplated in this case.
>
> ....Here, Lawrence is only in contempt of

> that part of the Turnover Order requiring him to repatriate the Trust res, not to provide an accounting which might otherwise fall under the rubric of section 1826.

See Memorandum Opinion Denying Debtor's Mot. for Immediate Release of Contemnor and Setting Further Hearing to Determine Status of Case, Case No: 97-14687-BKC-AJC (June 3, 2004).

In short, the issue of § 1826 has already been determined. Further, the scope of the instant referral is limited strictly to the question noted supra, i.e., whether the contempt sanction has lost its coercive effect given the length of Lawrence's incarceration. In this instance, the Court need not address § 1826 on the merits in order to resolve the limited issue before it.

IV. Analysis

A. Civil Contempt Generally

A bankruptcy court has the power to imprison a debtor for contempt of court when he fails to comply with a "turn over order." *See* In re Hardy, 97 F. 3d 1384 (11th Cir. 1996). Civil contempt sanctions are, of course, employed by the courts to secure compliance with their orders. See In re Grand Jury Investigation (Braun), 600F.2d420, 422 (3d Cir. 1979)(embedded in Anglo-American law is the inherent power of the judiciary to coerce obedience to its orders by summarily holding a recalcitrant person... in civil contempt, and then imprisoning him until he complies). Once a proper showing of a violation of the order had been made, "the burden of production then shifts to the alleged contemnor, who may defend his failure on the grounds that he was unable to comply...

In order to succeed on the inability defense, the alleged contemnor must go beyond a mere assertion of inability and establish that he has made in good faith all reasonable efforts to meet the terms of the court order he is seeking to avoid. Id. (citing Commodity Futures Trading Comm'n v. Wellington Precious Metals, 950 F. 2d 1525, 1529 (11th Cir. 1992)).

Here, as noted supra, Lawrence continued to assert and allege violations of sixth amendment rights, nullity of the proceedings below, and pending issues on appeal throughout the hearing. He made little or no comments, let alone arguments, on the issue of the contempt sanction and the loss of its coercive effect. His refusal to testify and continued repetition of statements made below regarding his fifth amendment privilege further complicated this Court's task.

In short, despite being reminded of the narrow issue before the court, Lawrence failed to go beyond the prior assertions he made in the various proceedings below. In light of the foregoing, this court has no choice but to find that Lawrence has failed to meet his burden to establish that he has made in good faith all reasonable efforts to meet the terms of the contempt order at issue.

B. Realistic Possibility of Compliance

Generally, prison time, in and of itself, will not satisfy the burden of proving that there exists no "realistic possibility" that the contemnor can comply with the court's order. Id. at 1530. While each passing month of incarceration may strengthen a claim of inability, "It can be assumed that at a certain point any man will come to value his liberty more than [the

amount of money the order requires him to pay and the pride lost in admitting that he has lied." Id. (quoting Thorn v. Jenkins, 760 F. 2d 736, 740 (7th Cir. 1985)).

In Thorn, the contemnor (held for failure to pay a fine and file a certificate attesting as to the payment) had been imprisoned for 15 months at the time of the opinion. In that case, the court warned: "If after many months, or perhaps even several years, the district judge becomes convinced that, although [contemnor] is able to pay he will steadfastly refuse to yield to the coercion of incarceration, the judge would be obligated to release [him] since incarceration would no longer serve the purpose of the civil contempt order - coercing payment." In so doing, the court then ordered the district court to reconsider the issue of incarceration at "reasonable intervals." Id.

As a general matter, when considering a motion to terminate a civil contempt order, "the district court must make an individualized determination as to whether there exists a realistic possibility that the contemnor will [comply]." *See* In re Grand Jury Proceedings (Howald), 877 F. 2d 849, 850 (11th Cir. 1989); see also, Simkin v. U.S., 715 F. 2d 34, 37 (2d Cir. 1983)("As long as the judge is satisfied that the coercive sanction might yet produce its intended result, the confinement may continue. But if the judge is persuaded... that the contempt power has ceased to have a coercive effect, the civil contempt remedy should be ended.")(testimony of grand jury witness).

The burden is on the contemnor to prove that "no such realistic possibility exists. Id. at 37. On review, the findings of a district court in this regard are subject to an abuse of discretion standard. See

Commodity Futures Trading Commission v. Wellington Precious Metals, Inc., 950 F. 2d 1525, (citing In re Grand Jury Proceedings (Howald), 877 F. 2d at 850, (In determining whether a civil contempt sanction has lost its coercive effect, a district court judge has virtually unreviewable discretion)). In this regard, the trial judge need not accept a contemnor's avowal not to testify, but must consider whether the circumstances reflect that there is no possibility that the contemnor will testify. See Simkin, 715 F.2d. at 37.

Here, the undersigned has conducted an individual determination as to whether there exists a realistic possibility that Lawrence will comply. During the proceedings Lawrence stated (in his role as a pro se litigant), among other things, that he, "never had any control of the trust," "[does] not have the ability to comply, "[has] no immunity." Judging by Lawrence's comments and demeanor, it does not appear that he intends to comply any time soon. Because Mr. Lawrence refused to testify and/or present evidence on the issue, it is not clear whether he has any future plans and/or ability to comply. Hence, the undersigned finds that he has failed to meet his burden in this regard as well.

Notwithstanding the above, the Court is troubled by the fact that Lawrence has been incarcerated for approximately six (6) years, and that his ongoing contempt sanction appears to have no end in sight. The Eleventh Circuit's cautionary words put it best:

> As we affirm the challenged orders, we are constrained to remind the district court and the Bankruptcy Court that, "civil contempt sanctions are intended to coerce compliance

> with a court order. In Wellington we acknowledged that 'When civil contempt sanctions lose their coercive effect, they become punitive and violate the contemnor's due process rights.' The district court must make a determination in each case whether there is a realistic possibility that the contemnor will comply with the order. We are mindful that, "although incarceration for civil contempt may continue indefinitely, it cannot last forever."

Lawrence 2002 at 1300. (emphasis added).

In that particular order, the appellate court instructed the bankruptcy court to reconsider Lawrence's incarceration at reasonable intervals in order to assure that the contempt sanction continues to serve, and is limited to, its stated purpose of coercion.

V. RECOMMENDATION

In sum, Lawrence was given a full hearing, and the opportunity to testify and present evidence. He declined both offers, and instead, continued to argue matters outside of this Court's limited referral. For reasons stated above, the undersigned finds that: 1) Stephan Jay Lawrence has failed to meet his burden to show that the contempt order has lost its coercive effect; 2) Stephen Jay Lawrence has failed to meet his burden to show that there exists no realistic possibility of compliance; and 3) The matter should be revisited by the bankruptcy court at reasonable intervals.

In light of the foregoing, the undersigned RESPECTFULLY RECOMMENDS that: 1) Lawrence's Motion for Release from Contempt

Incarceration [D.E. 119] be DENIED; 2) Appellee's Emergency Motion to Strike/Response in Opposition to Motion by Appellant for Release from Incarceration [D.E. 120] be DENIED; and that 3) Appellant's Emergency Request for a Hearing on the Motion for Release of Contemnor and an Order to Compel Production of Witnesses for Hearing [D.E. 121] be DEEMED MOOT.

Pursuant to S.D. Fla. Magistrate Rule 4(b), the parties may serve and file written objections with the Honorable Alan S. Gold, United States District Judge, within ten (10) days of being served with a copy of this Report and Recommendation. Failure to file timely objections shall bar the parties from attacking on appeal any factual findings contained herein. RTC v. Hallmark Builders, Inc.. 996 F. 2d 1144, 1149 (11th Cir. 1993); LoConte v. Dugger, 847 F.2d 745 (11th Cir. 1988).

RESPECTFULLY RECOMMENDED on this 6th day of October 2006.

William C. Turnoff

United States Magistrate Judge

cc: Hon. Alan S. Gold

Counsel of Record

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